U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:	*	
DAVID WYNN,	*	**DOCKET NO.: 12-3863-DB**
Respondent.	*	

ORDER GRANTING GOVERNMENT'S MOTION TO DENY RESPONDENT'S REQUEST FOR POSTPONEMENT OF HIS HEARING, GRANTING THE GOVERNMENT'S MOTION TO DISMISS RESPONDENT'S REQUEST FOR A HEARING, AND AFFIRMING THE PROPOSED THREE-YEAR DEBARMENT OF RESPONDENT

Introduction and Background

This matter is before the Debarring Official on the Government's Response to a request by Respondent for an indefinite postponement of his hearing, which had been scheduled for June 19, 2011. Respondent had requested the hearing in response to HUD's Notice of Proposed Debarment (Notice) dated February 29, 2012. Respondent did not appear on June 19, 2011, when the hearing was called. Whereupon, Government counsel moved to dismiss Respondent's appeal of his debarment. The Debarring Official's Designee declined to issue a bench ruling but took the Government's motion under advisement. Before the Debarring Official's Designee could issue a written ruling on the Government's oral motion to dismiss Respondent's appeal, a letter dated June 11, 2012, postmarked June 14, 1012, was received from Respondent requesting that the "hearing be postponed indefinitely." Respondent's letter, addressed to the "clerk," was received on June 21, 2012, in this office. Respondent based his request for a postponement on his claim that he was "currently appealing [his] case." The case to which Respondent made reference was his conviction for conspiracy to commit wire fraud, which the Notice advised him was "cause for debarment under the provisions of 2 C.F.R. §§ 180.800(a)(1), (3) and (4)."

In the Government's submission of June 26, 2012, styled Government's Response to Motion for Postponement, the Government argues, among other things, that Respondent's "conviction alone provides cause for his debarment," citing 2 C.F.R § 180.850 (b). Further, that because Respondent entered his guilty plea more than a year ago and because of the high bar facing a defendant after his plea of guilty and his sentencing therefor, the "Federal courts rarely

allow a defendant to withdraw a guilty plea after he has been sentenced and to do so 'only to prevent manifest injustice.'" (Citations omitted.) Counsel also notes that Respondent entered his guilty plea "knowingly and voluntarily" and had the assistance of counsel in the criminal proceeding. Additionally, Respondent, as of the time of his writing, had yet to file the appeal of his conviction. The Government also argues that Respondent "is not entitled to collaterally attack his conviction."

Based on the foregoing and Respondent's lack of present responsibility, the Government moves that Respondent's request for the indefinite postponement of his hearing be denied, the Government's motion to dismiss be granted, and Respondent be debarred for three years, as proposed in the Notice of February 29, 2012.

Discussion

Respondent's sole basis for his request for postponement of the hearing of his proposed three-year debarment is that he intends to appeal his criminal conviction. As the Government correctly argues, a respondent cannot legally collaterally attack a criminal conviction during a debarment proceeding. Additionally, there is no provision in the debarment regulations that allows for postponement of a hearing or of the debarment proceedings pending the outcome of a respondent's appeal of his criminal conviction. *See* 2 C.F.R. part 180. In the instant matter, the Respondent has indicated only an intention to file an appeal, not that an appeal has been filed. It is hardly worth stating that if an appeal of Respondent's conviction is no bar to the prosecution of a debarment action, an intention to appeal is even less legally meaningful in preventing a debarment proceeding from moving forward. It is worth mentioning also that Respondent entered into the plea agreement on April 5, 2011, and was sentenced on October 17, 2011.

It should be noted, too, that Respondent is faced with certain limitations that attend collateral and post-conviction proceedings in Federal court. Respondent's failure to meet these limitations may prejudice his right to seek post-conviction relief, which will further diminish his near non-existent chances of raising the issue of an appeal of his conviction as a bar to HUD's proceeding with the debarment action.

Additionally, the debarment regulations are unfriendly to Respondent's pursuit of his appeal of his proposed debarment in this forum. Pursuant to 2 C.F.R. § 180.830, Respondent "will not have an additional opportunity to challenge the facts if the debarring official determines that – (1) [Respondent's] debarment is based upon a conviction." As indicated *supra*, HUD'S proposed debarment is based upon Respondent's conviction for conspiracy to commit wire fraud. The cited regulation presents a further bar to Respondent's hope of using his intent to appeal, or an appeal, [1]as the basis for postponing this informal hearing on his debarment -- perforce Respondent would have to reargue in the debarment proceedings the facts on which his criminal conviction is based to persuade the Debarring Official that he could prevail in the debarment

[1] In Respondent's June 11, 2012, letter, Respondent states that he "is currently appealing [his] case." Respondent provided no further information to verify his claim.

proceeding, thereby halting the debarment action. As previously stated, a collateral attack by Respondent on his criminal conviction legally cannot be entertained.

Because Respondent's criminal conviction provides the required standard of proof to "establish the cause for debarment," 2 C.F.R. § 180.850 (a), Respondent's only recourse in his attempt to avoid exclusion was to plead such mitigating factors that "may influence the debarring official's decision." 2 C.F.R. § 180.860 (caption). Respondent did not, or chose not to, do this. Moreover, Respondent has presented no evidence that demonstrates he is "presently responsible" or that his exclusion is not necessary "to protect the public interest." 2 C.F.R. § 180.125.

Conclusion

WHEREFORE, for the reasons set forth above and in the administrative record, it is ORDERED that Respondent's request to postpone the scheduled hearing on his proposed debarment be DENIED; and it is further

ORDERED that Respondent's request for a hearing be DENIED; and it is further

ORDERED that the proposed three-year debarment of Respondent be AFFIRIMED in accordance with 2 C.F.R. §§ 180.870 (b)(2)(i) through (b)(2)(iv).

Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1) throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 7/17/12

Craig T. Clemmensen
Debarring Official
Departmental Enforcement Center

CERTIFICATE OF SERVICE

I hereby certify that on this 17TH day of July 2012 a true copy of the ORDER GRANTING GOVERNMENT'S MOTION TO DENY RESPONDENT'S REQUEST FOR POSTPONEMENT OF HIS HEARING, GRANTING THE GOVERNMENT'S MOTION TO DISMISS RESPONDENT'S REQUEST FOR A HEARING, AND AFFIRMING THE PROPOESED THREE-YEAR DEBARMENT OF RESPONDENT was served in the manner indicated.

Deborah Valenzuela
Program Specialist
Departmental Enforcement Center-Operations

HAND-CARRIED
Mr. Mortimer F. Coward, Esq.
Debarring Official's Designee

Joseph Kim, Esq.
Melissa Silverman, Esq.
Ana Fabregas, Esq.
Government Counsel

CERTIFIED MAIL

Mr. David Wynn
[redacted]